Koo Wing Cheung (L) & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–79 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND BALIA YUSOF JJCA
23 JULY 2013

Criminal Procedure — Appeal — Fact, finding of — Findings of fact by trial judge — Offence of common intention to traffic dangerous drugs — Both accused found in master bedroom — Drugs found in kitchen and different room — Nothing incriminating found on both accused — Both accused convicted under s 12(2) of the Dangerous Drugs Act 1952 — Whether trial judge correct in decision — Whether defence had created reasonable doubt and/or rebutted presumption of possession — Dangerous Drugs Act 1952 s 39B(1)(a)

The first and second appellants were Hong Kong and Chinese nationals, respectively, who were both charged and tried together for the common intention of trafficking in 54.1g of methamphetamine in the High Court, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The offence was said to have been committed at a double-storey house. Both the first and second appellants were arrested in the master bedroom at the upper floor but nothing incriminating was found in the room. A body search conducted on both the appellants also revealed nothing incriminating. Further search found the offending drugs hidden in the kitchen cabinet and in the cupboard in a room in the said house. According to both the appellants, they had never seen the said drugs at any time before the raid and had no knowledge of the same. At the conclusion of the trial, the trial judge found that both the appellants could not be said to be trafficking in the drugs but convicted the appellants with one of possession under s 12(2) of the DDA. Both the appellants were sentenced to 18 years imprisonment. The first appellant was also sentenced to the mandatory ten strokes of whipping. Hence, the present appeal. The appellants argued that the judge had failed to appreciate that the defence had created a reasonable doubt and/or rebutted the presumption of possession on the part of both the appellants; the drugs found in the kitchen and the drugs found in the room on the upper floor belonged to one 'Chee Chai'; both the appellants were arrested in the master bedroom and that their passports and the keys to the house were not recovered from their bodies or from the said house; there was no evidence that their clothes were found hanging in the master bedroom or in the house; and that others were occupying the said house besides both the appellants.

Held, allowing the appeal, acquitting and discharging the appellants:

(1) Both the appellants were arrested in the master bedroom. There were no

drugs recovered in the master bedroom. No keys to the said house were recovered from either of the appellants. In this regard, mere presence in one of the four rooms of the house without more did not show that both the appellants had or appeared to have the care or management of the house and the presumption that they were occupier could not be raised (see para 19).

(2) There was evidence that other persons had custody and control of the house, and hence had access to the house. The evidence points to the possibility of some other persons who could have placed the offending drugs there. There was evidence that DW3 stayed in the room next to the kitchen on the ground floor. There was also evidence that Chee Chai was the occupier of the said premises. There was evidence that Chee Chai was in possession of the drugs. All these were never judicially and adequately considered by the trial judge in his judgment. The learned trial judge had failed to view the evidence of the defence objectively and from all angles. By virtue of s 182A of the Criminal Procedure Code at the conclusion of the trial, the trial judge must consider all the evidence adduced before him and should decide whether the prosecution had proved its case beyond reasonable doubt. As a result, the trial judge had failed to give the evidence adduced by the defence its due weight and importance and which if duly considered, was capable of raising more than a reasonable doubt in the case of the prosecution against both the appellants (see para 19).

(3) The trial judge failed to critically and judicially appreciate the entire evidence in favour of the appellants. The failure to take into consideration the entire evidence adduced by the defence and the failure to undertake judicial appreciation of the defence, amounted in effect to a failure to consider a defence which had been put forward. This was a serious non-direction which amounted to misdirection by the court below, warranting appellate intervention (see para 19).

[Bahasa Malaysia summary

Perayu pertama dan kedua masing-masing adalah warganegara Hong Kong dan China, yang dituduh dan dibicarakan bersama untuk niat bersama mengedar 54.1g of methamphetamine di Mahkamah Tinggi, kesalahan bertentangan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Kesalahan tersebut dilakukan di rumah dua tingkat. Kedua-dua perayu pertama dan kedua ditangkap di bilik tidur utama di tingkat atas tetapi tiada apa-apa benda bersalah dijumpai di dalam bilik tersebut. Pemeriksaan badan dilakukan ke atas kedua-dua perayu juga menunjukkan tiada barang-barang bersalah. Penggeledahan selanjutnya mendapati bahawa dadah tersebut tersembunyi di dalam kabinet dapur dan di dalam almari dalam bilik di dalam rumah tersebut. Mengikut kedua-dua perayu, mereka tidak pernah melihat dadah tersebut pada bila-bila masa sebelum serbuan tersebut dan tidak mempunyai

pengetahuan mengenainya. Di akhir perbicaraan, hakim perbicaraan mendapati bahawa kedua-dua perayu tidak dapat dikatakan mengedar dadah tetapi menyabit perayu-perayu dengan milikan di bawah s 12(2) ADB. Kedua-dua perayu dihukum penjara 18 tahun. Perayu pertama juga dihukum kepada hukuman mandatori sepuluh sebatan. Maka, rayuan ini. Perayu-perayu berhujah bahawa hakim gagal untuk menilai bahawa pembelaan telah membentuk keraguan munasabah dan/atau mematahkan anggapan milikan ke atas kedua-dua perayu; dadah yang dijumpai di dalam dapur dan dadah yang dijumpai di dalam bilik di tingkat atas dimiliki oleh seorang yang bernama 'Chee Chai'; kedua-dua perayu ditangkap di bilik tidur utama dan pasport dan kunci rumah tidak dijumpai daripada badan mereka atau daripada rumah tersebut; tiada keterangan bahawa pakaian mereka dijumpai tergantung di dalam bilik utama atau dalam rumah tersebut; dan bahawa orang lain tinggal dalam rumah tersebut selain daripada perayu-perayu.

Diputuskan, membenarkan rayuan, membebaskan dan melepaskan perayu-perayu:

(1) Kedua-dua perayu ditangkap di dalam bilik utama. Tiada dadah dijumpai di dalam bilik tidur utama. Tiada kunci rumah tersebut dijumpai daripada kedua-dua perayu. Berkaitan ini, dengan kehadiran semata-mata dalam salah satu bilik di rumah tersebut tanpa apa-apa tidak menunjukkan bahawa kedua-dua perayu mempunyai atau nampak seperti menjaga atau menguruskan rumah tersebut dan anggapan bahawa mereka adalah penghuni tidak dapat dibangkitkan (lihat perenggan 19).

(2) Terdapat keterangan bahawa orang lain mempunyai kawalan dan jagaan terhadap rumah tersebut, dan dengan itu mempunyai akses kepada rumah tersebut. Keterangan menunjukkan kepada kemungkinan orang-orang yang lain yang meletakkan dadah berbahaya tersebut di situ. Terdapat keterangan bahawa DW3 tinggal di dalam bilik bersebelahan dapur di tingkat bawah. Juga terdapat keterangan bahawa Chee Chai adalah penghuni rumah tersebut. Terdapat keterangan bahawa Chee Chai memilik dadah tersebut. Kesemua ini tidak dihakimi dan dipertimbangkan dengan wajar oleh hakim perbicaraan di dalam penghakimannya. Hakim perbicaraan yang bijaksana gagal untuk mengambil kira keterangan pembelaan dengan objekif dan dari semua sudut. Mengikut s 182A Kanun Tatacara Jenayah pada akhir perbicaraan, hakim perbicaraan mesti mempertimbangkan kesemua keterangan yang dikemukakan di hadapannya dan patut memutuskan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Dengan itu, hakim perbicaraan telah gagal untuk membuat penilaian kepada keterangan yang dikemukakan oleh pembelaan dan jika

dipertimbangkan sewajarnya, dapat membangkitkan lebih keraguan munasabah dalam kes pihak pendakwaan terhadap kedua-dua perayu (lihat perenggan 19).

(3) Hakim perbicaraan gagal untuk secara kritis dan kehakiman menilai keseluruhan keterangan dalam memihak perayu-perayu. Kegagalan untuk mempertimbangkan keseluruhan keterangan yang dikemukakan oleh pembelaan dan kegagalan untuk menjalankan penilaian kehakiman pembelaan tersebut, merupakan kegagalan untuk mempertimbangkan pembelaan yang telah dikemukakan. Ini adalah salah arahan yang serius yang merupakan salah arah oleh mahkamah bawahan, mewajarkan campur tangan mahkamah rayuan (lihat perenggan 19).]

Notes

For cases on finding of fact, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 478–567.

Cases referred to

Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183; [1992] 1 CLJ Rep 376, SC (refd)

Legislation referred to

Criminal Procedure Code ss 182A, 289(a)
Dangerous Drugs Act 1952 ss 12(2), 39A(2), 39B(1)(a), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45A-198 of 2009 (High Court, Shah Alam)

Gooi Soon Seng (Gooi & Azura) for the appellants.
Siti Rafidah Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

Azahar Mohamed JCA (delivering judgment of the court):

[1] Koo Wing Cheung ('the first appellant'), a Hong Kong National, and Fan Ting Ting (the second appellant), a Chinese National, were charged and tried together for trafficking in 54.1g of methamphetamine before the Shah Alam High Court, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and punishable with mandatory death penalty prescribed under s 39B(2) of the DDA read with s 34 of the Penal Code ('Code').

[2] The offence was said to have been committed on 7 March 2009 at about 5.30am at a double-storey house number 25, Jalan Pekaka 8/10, Seksyen 8, Kota Damansara, Petaling Jaya, in the District of Petaling, in the State of Selangor Darul Ehsan. Both the appellants were said to act in concert in furtherance of a common intention to traffic the drugs. The offending drugs were found by the police hidden in the kitchen cabinet and in the cupboard in a room in the said house.

[3] After the conclusion of the case for the prosecution, the learned trial judge came to the finding that the prosecution had made out a prima facie case against both the appellants and therefore called upon them to enter their defence in respect of the offence charged.

[4] At the conclusion of the trial, the learned trial judge found that both the appellants could not be said to be trafficking in the drugs but convicted the appellants with one of possession under s 12(2) of the DDA, punishable under s 39A(2) of the DDA read with s 34 of the Code. Both the appellants were sentenced to 18 years imprisonment from the date of sentence. The first appellant was also sentenced to the mandatory ten strokes of whipping. By virtue of s 289(a) of the Criminal Procedure Code ('CPC'), sentence of whipping is forbidden on the second appellant, a female. The appellants then appealed to this court. We heard their appeal, wherein at its conclusion we unanimously allowed it. As a result, the convictions were quashed and the sentences set aside. We now give our reasons.

[5] Very briefly the facts giving rise to the charge against both the appellants are as follows. On 6 March 2009 at about 2.30pm, Inspector Muhammad Ikhbal bin Mohd Isa ('PW11') attended a briefing given by ASP Balasubramaniam regarding a drugs operation. After the said briefing, at about 4pm PW11 and a team of police officers went to the address as stated in the charge to carry out surveillance on the house.

[6] On 7 March 2009 at about 5.30am, the police raided the house. PW11 instructed his men to cut open the fence beside the house and gained entry through the sliding door by cutting open the padlock and the grille of the sliding door. Upon gaining entry, PW11 and his team rushed inside. PW11 then instructed SM Mohd Dalia bin Mansor ('PW12') and his team to conduct a search on the upper floor of the house. Meanwhile PW11 remained at the ground floor.

[7] Both the first and second appellants were arrested by PW12 in the master bedroom at the upper floor and they were handed over to PW11 at the ground floor. PW11 conducted a body search on both the appellants but nothing incriminating was found.

[8] Subsequently PW11 and his team conducted a thorough search in the house. Among others, PW11 found substances, which were later confirmed by the chemist to be methamphetamine, hidden in two separate places in the house as follows:

(a) 33.0g in a bottle inside a cabinet in the kitchen on the ground floor; and

(b) 21.1g in a plastic container in the cupboard drawer in the second room on the upper floor.

[9] A search in the master bedroom at the upper floor where both the appellants were arrested did not find anything incriminating.

[10] Upon their defence being called, both the appellants elected to give sworn evidence. According to the first appellant, he was staying in an apartment on the 9th floor at Block C along Jalan Tun Razak opposite the Indonesian Embassy from January 2009–5 March 2009. On 27 February 2009, he entered Singapore through Sultan Iskandar Complex and stayed in Singapore for about eight days and entered Malaysia through the same complex on 6 March 2009. It is to be noted this version was corroborated by the first appellant's passport (see exh D201).

[11] The first appellant further testified that on 6 March 2009, one Chee Chai fetched him from Johor Bahru back to Kuala Lumpur where they picked up the second appellant in Jalan Tun Razak, Ampang, Kuala Lumpur for food and drinks. Incidentally the first appellant's rented apartment had expired and he needed to stay in Kuala Lumpur for a few more days before flying to Indonesia and the second appellant needed to obtain a visa to enter Indonesia. At the suggestion of Chee Chai, the first appellant agreed to move into Chee Chai's rented house in Kota Damansara (place of incidence) together with the second appellant. According to the first appellant, Chee Chai fetched both the appellants to his rented house in Kota Damansara on the late afternoon on 6 March 2009. Upon reaching the said place, both the appellants met Or Chi Kwan ('DW3'), Ah Poon, Ah Soon and two other ladies whom they do not know. Chee Chai asked both the appellants to stay in the master bedroom because that was the only room with a double bed. The first appellant testified that DW3 stayed in a room situated on the ground floor and that Chee Chai stayed in a room on the upper floor opposite the master bedroom. Both the appellants were not given any keys to the said house. When Chee Chai, DW3, Ah Poon, Ah Soon and the two ladies left the house, both the appellants went to bed. According to the first appellant, whilst they were asleep, the police raided the said house and found drugs in a room on the upper floor and in the kitchen.

[12] The second appellant's evidence basically corroborated the first

appellant's evidence relating to their stay in the apartment at Jalan Tun Razak and their shifting into Chee Chai's rented house on 6 March 2009.

[13] According to both the appellants, they had never seen the said drugs at any time before the raid and had no knowledge of the same.

[14] In his testimony, DW3 said that he moved into Chee Chai's rented house in Kota Damansara at the request of Chee Chai at the end of February 2009. Whilst he was staying there and before both the appellants shifted in, he saw the plastic container (exh P77) containing the drugs seized by the police from a room on the upper floor and he knew that it contained drugs because Ah Soon gave the said drugs to Chee Chai and Chee Chai offered the said drugs to them for consumption. According to DW3, this happened on the 2nd or 3rd of March 2009. After consuming the said drugs, DW3 did not know where P77 was kept. DW3 further testified that after he had shifted into Chee Chai's rented house, Chee Chai told him not to touch the bottle (exh P57) containing the drugs which the police seized from the cabinet in the kitchen. According to DW3, he saw Chee Chai writing in Chinese character 'do not touch' and then pasted it on P57.

[15] Before us, learned counsel for the appellants argued that the learned trial judge had erred in finding both the appellants guilty of the possession charge on the principal ground that he had failed to appreciate that the defence had created a reasonable doubt and/or rebutted the presumption of possession on the part of both the appellants. It was argued that the drugs found in the kitchen and the drugs found in the room on the upper floor belonged to one Chee Chai. Learned counsel emphasised the point that both the appellants were arrested in the master bedroom and that their passports and the keys to the house were not recovered from their bodies or from the said house. According to learned counsel, there was no evidence that their clothings were found hanging in the master bedroom or in the house. From the primary facts adduced by the prosecution, learned counsel argued, it can be inferred that others were occupying the said house besides both the appellants.

[16] On the facts of the case, we find there is much merit in the arguments of learned counsel. In the first place, we note that the defence had consistently revealed the general position of the appellants at the earliest possible stage through the cross-examination of the relevant prosecution's witnesses, in particular PW11, at the trial. It follows from this that the defence of both the appellants in the present case was not something that was sprung for the first time in the defence case (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561).

[17] According to DW3, he stayed in the house raided by the police on

7 March 2009 since late February 2009. DW3 stayed in the room on the ground floor next to the kitchen after Chee Chai's brother and his girlfriend went overseas. DW3 identified the clothings and the tooth brush in the said room as his belongings. According to DW3 when he moved into the said premises, Chee Chai told him not to touch the bottle P57. DW3 testified that he saw Chee Chai writing in Chinese character 'do not touch' and pasted it on the bottle. Here, we note that the prosecution put to DW3 that the 33g of drugs in P57 found in the kitchen belonged to DW3. Furthermore, according to DW3, he saw Ah Soon bringing a plastic container, P77 and gave the said container to Chee Chai. Chee Chai then took it and gave it to them for their consumption. The prosecution also put to DW3 that the drugs in P77 belonged to DW3. In perusing the record of appeal, we find that these pieces of evidence by DW3 had remained unshaken.

[18] It is important to note that a Perodua Myvi was seen at the said house by PW11 while carrying out surveillance on 6 March 2009. Another significant point to note is that a Proton Wira which was seized from the porch of the said house did not belong to either of the appellants. Photographs tendered at the trial show that the other rooms were occupied. These are favourable evidence to the appellants appearing from the prosecution evidence in this case.

[19] Therefore, against the backdrop of the above defence, in our judgment, the learned trial judge was duty-bound to take into account and give proper weight to the matters to which we have adverted to. In this case, both the appellants were arrested in the master bedroom. There were no drugs recovered in the master bedroom. No keys to the said house were recovered from either of the appellants. In this regard, mere presence in one of the four rooms of the house without more did not show that both the appellants had or appeared to have the care or management of the house and the presumption that they were occupier could not be raised (see *Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74). It should perhaps be emphasised that there was evidence that other persons had custody and control of the house, and hence had access to the house. As we have indicated earlier, a Perodua Myvi was seen at the said house by PW11 while carrying out surveillance on the house and that a Proton Wira which was seized from the porch of the said house did not belong to either of the appellants. The evidence points to the possibility of some other persons who could have placed the offending drugs there. There was evidence that DW3 stayed in the room next to the kitchen on the ground floor. There was also evidence that Chee Chai was the occupier of the said premises. There was evidence that Chee Chai was in possession of P57 which contained the drugs and that it was Chee Chai who wrote the words 'do not touch' and pasted the same on P57. There was evidence that Chee Chai had possession of P77, a few days before when he took out P77 and offered the drugs contained in P77 to DW3 and two others. All these were never judicially and adequately considered

by the learned trial judge in his judgment. The learned trial judge had failed to view the evidence of the defence objectively and from all angles. Now, by virtue of s 182A of the CPC at the conclusion of the trial, the learned trial judge must consider all the evidence adduced before him and shall decide whether the prosecution had proved its case beyond reasonable doubt. As a result, the learned trial judge had failed to give the evidence adduced by the defence its due weight and importance and which if duly considered was capable of raising more than a reasonable doubt in the case of the prosecution against both the appellants (see *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183; [1992] 1 CLJ Rep 376). The learned trial judge failed to critically and judicially appreciate the entire evidence in favour of the appellants. In our judgment, the failure to take into consideration the entire evidence adduced by the defence and the failure to undertake judicial appreciation of the defence, as we have highlighted above, amounted in effect to a failure to consider a defence which had been put forward. In our view, this is a serious non-direction which amounts to a misdirection by the court below warranting appellate intervention (see *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238). In this regard, Edgar Joseph Jr SCJ in *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 said:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for, in the words of Pickford J in *R v Bundy* 5 Cr App R 270:
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> > the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
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> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

[20] After having scrutinised the entire evidence contained in the appeal records with care and carefully examined the judgment of the learned trial judge and for all the reasons already given, we were of the view that the appellants' convictions were wholly unsafe. This appeal was, therefore, allowed. Accordingly, we quashed and set aside the convictions and sentences against both the appellants. Both the appellants were acquitted and discharged.

Appeal allowed, appellants acquitted and discharged.

Reported by Afiq Mohamad Noor